

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

2021-OLR-8

Mark S. Tishberg,
Attorney at Law

Attorney Mark S. Tishberg of Mequon engaged in misconduct in three matters.

FIRST MATTER

On or about July 9, 2018, a client hired Tishberg to represent him in a divorce matter. On or around August 16, 2019, the client also hired Tishberg to represent him in an unrelated civil matter. During the course of Tishberg's representation of the client, Tishberg also agreed to assist the client in other legal matters, including an eviction matter, and the removal of Wisconsin Circuit Court Access records for a previously dismissed criminal matter and restraining order against the client.

The client paid Tishberg a total of \$3,150 for Tishberg's representation and work on all matters. On July 20, 2018, the client paid Tishberg \$3,000 as an advanced fee for the divorce matter, and on or around August 15, 2019, an additional \$150 as a "bill payment." Subsequent to the filing of the client's grievance matter with the Office of Lawyer Regulation ("OLR"), Tishberg was unable to locate his signed fee agreement with the client in the divorce matter. Consequently, on or around April 10, 2020, Tishberg sent the client a second copy of the fee agreement. The client did not sign and return the second copy. Tishberg states he forgot to provide the client with a written agreement for his representation in the civil matter. Tishberg

did not prepare written fee agreements for his work on any of the other miscellaneous matters because of minimal cost and time spent on the matters.

Regarding the divorce matter, on December 23, 2019, the client and his wife signed a Marital Settlement Agreement. On December 23, 2019, the court granted the divorce and ordered Tishberg to file Findings of Fact, Conclusions of Law, and Judgment within thirty days. On February 20, 2020, the court wrote to Tishberg to request the Findings of Fact, Conclusions of Law, and Judgment. Tishberg submitted the documents on April 13, 2020, after the court had issued a show cause order on March 27, 2020. Tishberg stated that prior to receiving the order to show cause, he believed he had filed the requested documents.

On April 13, 2020, Tishberg sent to the attorney for the client's now ex-wife a check from Kemper Insurance Company payable to the client and his ex-wife in the amount of \$346. The check issued by Kemper Insurance resulted from the client's cancellation of the insurance policy on a rental property sold by the client on September 12, 2019. Tishberg asked the attorney for the client's ex-wife to have her sign the check and return it to Tishberg. Tishberg took no further steps to follow up on the check.

On April 20, 2020, the court entered judgment of divorce. As part of the marital settlement agreement, the client's ex-wife received a vehicle, which she agreed to "refinance in her own name within Ninety (90) days from the date of judgment." On May 29, 2020, the client's ex-wife filed an Order to Show Cause for Finding of Contempt because of the client's failure to sign over the title to the vehicle to her, along with the client's failure to pay a \$15,000 Marital Equalization Payment, which had been due by March 22, 2020.

Neither spouse could locate the vehicle title, so Tishberg advised the client to obtain a duplicate title to the vehicle from the DMV. Tishberg also researched the issue himself and

discovered that Landmark Credit Union needed to release the title. On June 17, 2020, Tishberg spoke to the client's ex-wife's attorney regarding the transfer of title to the vehicle, and emailed the attorney a copy of a record from the Wisconsin Department of Transportation showing that Landmark Credit Union held a lien on the vehicle. At the time Tishberg's representation of the client ended on July 17, 2020, Tishberg was unaware if the title issue had been resolved. According to Wisconsin Circuit Court Access Records, neither the title issue nor Marital Equalization Payment issue were resolved until October 26, 2020.

On July 10, 2020, Tishberg wrote to the client (OLR was copied on the letter) stating that he had been unable to reach the client for "over two weeks" and that the client needed to address the title to the vehicle. Tishberg informed the client that he had filed a motion to withdraw from his representation of the client due to the client's failure to communicate.

The civil case in which Tishberg represented the client stemmed from a dispute between the client and a building restoration service ("Plaintiff"). Plaintiff had been hired by the client and his ex-wife to repair damages to their home and garage that had resulted from a fire. The dispute involved two payments made by the client's insurer to be paid to Plaintiff for his repair work. The two checks had to be signed by both the client, the client's ex-wife, and Plaintiff in order to be cashed.

On September 3, 2019, the same day that Tishberg entered the civil case, Plaintiff filed a motion for default judgment. On or around September 5, 2019, Tishberg received notice of the motion and told the client that he would handle the matter. Tishberg set up a meeting with the parties and counsel for September 21, 2019 to discuss the case. On September 10, 2019, the court scheduled a hearing on the motion for default judgment for October 10, 2019. No appearances were made at the October 10, 2019 motion hearing, and no motion had been filed to

expand time limits. Consequently, the court granted judgment against the client. As to the client's ex-wife, also a defendant in the matter, the matter remained open because an answer had been filed on her behalf.

Tishberg did not inform the client of the October 10, 2019 motion hearing. Tishberg stated that he did not receive notice of the hearing because it may have gone to his "spam mail." Tishberg had not taken any steps to determine whether a motion hearing had been scheduled because he "wrongfully believed that the 'default' had been withdrawn" at the September 21, 2019 meeting. Tishberg took no steps to verify whether the motion for default judgment had been vacated.

On November 1, 2019, the court entered an order for default judgment against the client. Judgment was entered against the client in the amount of \$83,325.06, plus 1.5% monthly interest beginning on June 1, 2019, representing a lien under Chapter 779 of the Wisconsin Statutes. The order required the sheriff's department to auction the client's property. Tishberg learned of the default judgment on or around October 22, 2019, upon receiving an email with the proposed default order. Tishberg acknowledged, "The judgment against Joseph Chiarello was probably the result of the default actually entered on October 10, 2019.

On December 27, 2019, Tishberg sent to the client's ex-wife's attorney a list provided by the client's insurer of all checks paid by the insurer relating to the client's claim. Tishberg noted in his email to the attorney that there was approximately \$23,821 paid by the client's insurer that Tishberg could not account for. Tishberg asked the client's ex-wife's attorney if the ex-wife could account for that money.

On March 12, 2020, Tishberg appeared telephonically for a motion hearing on a motion for summary judgment that had been filed on December 6, 2019 against the client's ex-wife.

Wisconsin Circuit Court Access notes for the hearing stated, “Atty Tischberg [sic] hangs up as he does not represent [the client’s ex-wife]; [the client’s ex-wife] does not appear; [attorney for the client’s ex-wife] moves for summary judgment as to [the client’s ex-wife]; Court grants judgment against [the client] by default and [the client’s ex-wife] by summary judgement.” Tishberg stated that after he entered the hearing by telephone, the judge in the matter told him he could not participate in the hearing because he did not represent the client’s ex-wife, who was the only defendant named in the summary judgment motion. Tishberg further stated to OLR:

I do not understand how [the judge] could issue a default judgment against [the client], as [the client] was not a named party to the Summary Judgment, and [the judge] prohibited me from participating in the hearing. Further, as of June 21, 2020, there is no Order filed for me to challenge or appeal.

At the March 12, 2020 hearing, Tishberg planned on addressing the default judgment entered against the client. The only other steps taken by Tishberg to address the default judgment was speaking to Plaintiff’s counsel “about paying off the contract amount owed.” On April 17, 2020, Tishberg filed a Notice of Motion and Motion to Vacate Default Judgment and Reopen Matter. On September 8, 2020, a motion hearing was held, with successor counsel appearing on the client’s behalf. The court granted the motion and reopened the matter, finding that Tishberg’s “mistake/inadvertence are grounds and defendant may have a defense.”

As for remaining matters, Tishberg agreed to seek the removal of Wisconsin Circuit Court Access records for a previously dismissed criminal matter against the client. Tishberg failed to take steps to complete this matter on the client’s behalf because of a heavy workload and later the onset of the COVID-19 pandemic.

SCR 20:1.3 states, “A lawyer shall act with reasonable diligence and promptness in representing a client.” Tishberg violated SCR 20:1.3 as follows:

- In the divorce, by failing to timely file Findings of Fact, Conclusions of Law, and Judgment prior to the court issuing a show cause order on March 27, 2020.
- In the divorce, by failing follow up on the \$346 check issued by Kemper Insurance, which was sent to counsel for the client's ex-wife for signature on April 13, 2020.
- In the divorce, by failing to take reasonable steps from March 22, 2020 to June 17, 2020 to ensure his client complied with the marital settlement agreement as it related to the transfer of title of the vehicle.
- In the civil action, by failing determine the status of the Plaintiff's motion for default judgment subsequent to the September 21, 2019 meeting, which resulted in a default judgment being entered against his client.
- In the civil action, subsequent to learning on October 22, 2019 of the default judgment entered against his client, by failing to take steps, other than a failed attempt at a March 12, 2020 motion hearing, to address the default judgment until filing a Motion to Vacate Default Judgment and Reopen Matter on April 17, 2020.
- By failing to take steps seek the removal of Wisconsin Circuit Court Access records for Dodge County case no. 19CF57.

By failing to provide to the client a written fee agreement defining the scope of his representation in all matters and explaining the purpose and effect of the fees and advanced fees paid to him, Tishberg violated SCR 20:1.5(b)(1), which states, "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the

representation, except when the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be \$1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client,” and 20:1.5(b)(2), which states, “If the total cost of representation to the client, including attorney's fees, is more than \$1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.”

SECOND MATTER

On August 14, 2018, Tishberg entered a Forest County case representing a client. The client faced several charges, including felony possession cocaine and THC. Tishberg was the client’s third attorney in the matter. While the Forest County case was pending, the client was charged in Milwaukee County with three felony counts, including possession with intent to deliver a controlled substance, fleeing or eluding an officer, and second-degree recklessly endangering safety. The criminal complaint against the client was filed in Milwaukee County on April 11, 2019. Tishberg also represented the client in the Milwaukee County case, appearing with her at her initial appearance on April 11, 2019.

On May 21, 2020, Tishberg filed a Notice of Motion and Motion to Modify Sentence in the Milwaukee County case. The motion requested an additional thirty-six days sentencing credit for the client, based on the client’s incarceration on the matter from April 6, 2019 until her release on bail on May 11, 2019.

By letter dated May 21, 2020, a Staff Attorney for the Milwaukee County Clerk of Circuit Court, Criminal Division, requested that Tishberg provide additional information relating to his motion to modify sentence in the Milwaukee County case. The Staff Attorney stated:

You are requesting 36 days of additional sentence credit for the period of April 6, 2019 to May 11, 2019. It appears that your client may have been in custody for some of this period in connection with [the Forest County case]. Judge Stenz ordered 118 days of credit at the July 31, 2019 sentencing hearing in that case and ordered the defendant to serve a year in jail as a condition of probation. The court will require more information about the credit and condition time ordered in the Forest County case. Specifically, the 118 days of credit represents credit for what days in custody? Also, when did the defendant commence serving the condition time and when did or does that term expire? The court will require a written response that may be efiled or sent to my attention

Tishberg did not respond to the Staff Attorney's May 21, 2020 letter. Subsequent to receiving the letter, Tishberg stated he spoke with the Staff Attorney and determined that the client was probably not entitled to the thirty-six-day credit because those days had been utilized in the client's Forest County case. On March 8, 2021, Office of Lawyer Regulation staff spoke with the Staff Attorney, who did not recall speaking with Tishberg regarding the client's case subsequent to his May 21, 2020 letter. The Staff Attorney stated that he had expected Tishberg to respond to his May 21, 2020 with the information requested therein.

On August 13, 2020, Tishberg filed a second Notice of Motion and Motion to Modify Sentence in the Milwaukee County case. Tishberg stated to OLR that he had "decided to modify my original motion, and file a new motion arguing that the credit time was "stayed", and that [the client] should have the 36 days credited to [the client]'s imposed Milwaukee sentence." Tishberg further stated to OLR that while the Staff Attorney had initially convinced him that the client was not entitled to the thirty-six-day credit, further thought led him to file the August 13, 2020 motion. Tishberg did not intend for the August 13, 2020 motion to serve as a response to the Staff Attorney's May 21, 2020 letter.

In the August 13, 2020 motion, Tishberg argued that while the client received some credit in her Forest County case, that credit was stayed until such time as the client was revoked (if revocation occurred). Tishberg further argued that the thirty-six-day credit should be applied to

the client's Milwaukee County case because she had served that time in the Milwaukee County Jail. By order dated December 14, 2020, the court in the client's Milwaukee County case denied Tishberg's August 13, 2020 motion. In the order, the court stated:

The court cannot grant the defendant an additional 36 days of credit in this case if she already received a windfall of 104 days. If the defendant wishes to pursue her request for additional credit, she must provide the court with the information requested in [the Staff Attorney's] May 21, 2020, letter.

Finally, the court advised the client that if she could provide information showing that she was given credit in her Milwaukee County case "while she was serving condition time in her Forest County case," the court may amend its order.

On December 29, 2020, Tishberg filed a Notice of Motion and Motion to Modify Sentence in Forest County case no. 17CF106. The motion argued that because the client had been incarcerated in Milwaukee County Jail from April 6, 2019 until May 11, 2019, and because Forest County had placed their "hold" on the client on April 8, 2019, the client should have received the thirty-six-day credit in her Milwaukee County case rather than her Forest County case. On February 4, 2021, the Forest County court denied the motion, stating that the credit had been appropriately applied.

By failing to respond to the Milwaukee County Clerk of Circuit Court, Criminal Division Staff Attorney's May 21, 2020 letter, Tishberg violated SCR 20:1.3. SCR 20:1.3 states, "A lawyer shall act with reasonable diligence and promptness in representing a client."

THIRD MATTER

On or around December 10, 2018, a client hired Tishberg to represent him in a revocation matter. On or around March 14, 2019, the client hired Tishberg to represent him in a Milwaukee County criminal matter. On February 21, 2019, the Division of Hearings and Appeals issued a decision revoking the client's extended supervision in two Milwaukee County criminal matters.

According to Wis. Stat. § 893.735(2), the client had forty-five days from the date of the February 21, 2019 decision to file a petition for a writ of certiorari. The deadline for filing could not be extended for any reason.

On April 9, 2019, Tishberg filed a petition for a writ of certiorari on the client's behalf. Tishberg filed the petition beyond the deadline established in Wis. Stat. § 893.735(2). Tishberg stated that he either miscounted the days, or he may have believed that a letter he had written on February 27, 2019, to the Administrator for Hearing and Appeals, asking the Administrator to reconsider his appeal decision provided Tishberg with additional time to file. Tishberg stated that while he is uncertain if he believed his February 27, 2019 letter extended the deadline, he "should have known that it did not extend the deadline for an [sic] Writ." The Administrator did not respond to Tishberg's February 27, 2019 letter.

On April 19, 2019, the court dismissed the client's petition for a writ of certiorari because the petition had been filed outside of the forty-five day deadline. Tishberg did not take any additional steps to remedy the dismissal of the petition because his reading of Wis. Stat. §893.735(2) confirmed that the deadline was jurisdictional and could not be extended for any reason.

By failing to file a petition for a writ of certiorari on his client's behalf by the statutory deadline due to miscalculating the deadline or erroneously believing the deadline had been extended, Tishberg violated SCR 20:1.1. SCR 20:1.1 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Tishberg previously received a public reprimand on October 12, 2020 for violations of SCR 20:1.3, 20:1.5(c), and 20:3.4(d). Tishberg also previously received a public reprimand in

2014 for violations of former SCR 20:1.2(a), 20:1.3, 20:1.4(a)(3) and (4), 20:1.4(b), 20:1.5(c), and 20:8.4(c).

In accordance with SCR 22.09(3), Attorney Mark S. Tishberg is hereby publicly reprimanded.

Dated this 28th day of August, 2021.

SUPREME COURT OF WISCONSIN

/s/
Honorable Jeffrey A. Kremers, Referee